Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-594 OF 1997
KAMALANATHAN RATNAM J
30 SEPTEMBER 1999

Civil Procedure *— Case management — Directions made by trial judge during pre-trial case management — Whether binding on parties — Failure by defendant to object to proposed documentary evidence during pre-trial case management — Whether defendant barred from raising objection on admissibility of such evidence during trial*

Civil Procedure *— Jurisdiction — Matters relating to Islamic religion — Whether civil court appropriate forum*

Contract *— Damages — Aggravated damages — Factors to be considered in awarding aggravated damages*

Contract *— Damages — Exemplary damages — Award to be made in exceptional cases — Object of — Factors to be considered in awarding exemplary damages*

Evidence *— Adverse inference — Refusal of defendant to testify on own behalf — Effect of — Material facts personal to and within personal knowledge of defendant — Whether adverse inference ought to be drawn against defendant*

The plaintiff claimed that he had loaned the defendant a sum of RM262,350 to enable her to purchase a total of 162,000 shares in Insas Sdn Bhd ('the shares'). The consideration moving from the defendant was that she would convert to the personal law of the plaintiff, Islam, and marry the plaintiff. It was also a condition that the defendant would transfer 50% of the shares to the plaintiff with the remaining 50% to be held by the defendant in her name and to be used by her in the event of the plaintiff pre-deceasing her. The defendant was also required to return the shares to the plaintiff if she failed to convert and marry the plaintiff. The plaintiff claimed, inter alia, for (i) a declaration that he was the beneficial owner of the shares in the defendant's name; (ii) price of those shares; (iii) profits made by the defendant in selling part of the shares; (iv) exemplary and aggravated damages for deception and fraud in misleading the plaintiff into believing that the defendant would convert to Islam and marry him; (v) a permanent injunction restraining the defendant from dealing with the shares in any manner whatsoever. The defendant in her statement of defence denied that she was the person referred to as the defendant in the writ. She further contended that the plaintiff was not entitled to the return of the shares or its value in money on account of a set-off she was claiming. The defendant however refused to testify on her own behalf. During the course of trial, the court had to deal with a number of issues, namely: (i) an objection by the defendant's counsel on the admissibility of certain photographs after directions had been given at a pre-trial case management meeting; (ii) the effect

of the defendant's failure to testify; (iii) an attempt by the defence to call an expert on Islamic law to show that admissions of sexual intimacy with a married woman by the defendant had infringed provisions of the Contracts Act 1950; and (iv) the issue of damages.

Held, allowing the plaintiff's claim:

(1) During the pre-trial case management meeting, the court had directed the parties to file all documents into bundles called the common agreed bundles of documents ('CABD'). The court had further directed that if any party wished to challenge any document in the CABD, the challenger was to write to the other side requesting that the contents of the document in question be proved. The court had explicitly stated that any document not challenged would be deemed agreed and admitted of its contents. The plaintiff had put in certain photographs into the relevant bundle and the defendant's previous solicitors did not object to the photographs at the material time. The photographs therefore stood as agreed and admitted of their contents and the defendant's new counsel's objection to the admissibility of the photographs during trial could not be sustained, notwithstanding the possibility of the new counsel being unaware of the court's directions (see p 596D–F).

(2) Having given every indication that the claim would be resisted to the hilt, and having denied in the defence that she agreed to convert to Islam and marry the plaintiff in return for the promised loan, the defendant should have been the first witness for the defence. It was the bounden duty of the defendant, acquainted thoroughly with the facts of the case as she was, to testify on her own behalf and her failure to do so clearly discredited the truth of her case and establish the truth of the plaintiff's case. While there is no rule of law that the defendant had to let herself be examined as a witness to establish her case, the court was perfectly justified in rejecting the averments in her defence unless there was other persuasive evidence in support of her case. Since all the material facts had been alleged against the defendant and the facts were personal to and within the personal knowledge of the defendant, and the defendant refused to testify without any plausible reason, an adverse inference had to be drawn against her (see pp 597G–H, 598B–D).

(3) The attempt by the defence to call the expert on Islamic law to show that admissions of sexual intimacy with a married woman by the defendant had infringed s 24(c), (b) and (e) of the Contracts Act 1950 was not relevant and would not assist the court. In any event, matters relating to the Islamic religion should be dealt with by a separate court, namely the syariah court (see pp 601F–G, 602C–D).

(4) The exceptional cases in which an award for exemplary damages may be made fall into three categories, namely: (i) oppressive,

arbitrary or unconstitutional conduct by government servants; (ii) conduct calculated to result in profit; and (iii) express authorization by statute. On the facts, the plaintiff's case fell into the second category. The object of exemplary damages is to punish and the prevalent view is not to make excessive awards under the second category. The court in making such an award ought also to consider the conduct of the parties, in particular the defendant. Taking into account all the factors and rejecting the plaintiff's own quantification, an award of RM500,000 should be made (see pp 603G–604A, 604D–605B).

(5) A plaintiff is entitled to aggravated damages if he can show that the conduct of the defendant was so obnoxious as to warrant an award. In this case, considering the fact that the plaintiff was subjected to pro-longed and lengthy cross-examination for more than 14 days without let-up by two experienced counsel on matters that remained unrebutted and considering the callous manner of such questioning and by putting suggestions which the defendant knew she could establish, the plaintiff had more than established a case for aggravated damages and a sum of RM500,000 should be awarded (see p 605B–C, G–H).

[Bahasa Malaysia summary

Plaintif mengatakan yang beliau telah meminjam kepada defendan wang sebanyak RM262,350 untuk membolehkannya membeli saham-saham berjumlah 162,000 di Insas Sdn Bhd (saham-saham tersebut'). Balasan yang datang daripada defendan adalah bahawa beliau akan memeluk undang-undang peribadi plaintif iaitu Islam, dan berkahwin dengan plaintif. Adalah juga merupakan suatu syarat bahawa defendan akan memindahkan 50% saham-saham kepada plaintif dengan baki 50% dipegang oleh defendan di atas namanya dan digunakannya di dalam keadaan di mana plaintif meninggal dunia sebelum defendan. Defendan juga diperlukan untuk memulangkan saham-saham kepada plaintif jika beliau gagal memeluk Islam dan berkahwin dengan plaintif. Plaintif menuntut, antara lain, untuk: (i) suatu deklarasi bahawa beliau merupakan tuan punya benefisial saham-saham tersebut di atas nama defendan; (ii) harga untuk saham-saham tersebut; (iii) keuntungan yang diraih defendan di dalam penjualan saham-saham; (iv) ganti rugi teladan (exemplary damages) dan juga ganti rugi teruk (aggravated damages) untuk penipuan dan frod di dalam memperdayakan plaintif untuk mempercayai bahawa defendan akan memeluk Islam dan berkahwin dengannya; (v) suatu injunksi tetap untuk menegah defendan daripada menguruskan saham-saham dengan sebarang cara. Defendan dalam pernyataan pembelaannya menyangkal bahawa beliau adalah orang yang dimaksudkan sebagai defendan di dalam writ. Selanjutnya, beliau menegaskan bahawa plaintif tidak berhak kepada pengembalian saham-saham tersebut atau nilainya dari segi wang atas dasar tolakan

dalam tuntutannya. Semasa perbicaraan, mahkamah terpaksa mengadili beberapa isu-isu, iaitu: (i) bantahan oleh peguam defendan berkenaan dengan kebolehterimaan gambar-gambar tertentu selepas arahan-arahan diberikan di mesyuarat pengendalian kes sebelum perbicaraan; (ii) kesan kegagalan defendan untuk memberikan keterangan; (iii) suatu cubaan oleh pembelaan untuk memanggil pakar berkenaan dengan undang-undang Islam untuk menunjukkan yang pengakuan hubungan rapat secara seksual dengan seorang wanita yang telah berkahwin oleh defendan telah melanggar pruntukan-peruntukan Akta Kontrak 1950; dan (iv) persoalan berkenaan dengan ganti rugi.

Diputuskan, membenarkan tuntutan plaintif:

(1) Semasa mesyuarat pengendalian kes sebelum perbicaraan, mahkamah telah mengarahkan pihak–pihak untuk memfailkan semua ikatan dokumen-dokumen yang dipanggil ikatan dokumen-dokumen yang dipersetujui. Selanjutnya, mahkamah mengarahkan bahawa sebarang pihak yang ingin mencabar sebarang dokumen di dalam ikatan-ikatan dokumen-dokumen yang dipersetujui, pencabar mestilah menulis kepada pihak yang lain meminta bahawa kandungan-kandungan di dalam dokumen yang dipersoalkan dibuktikan. Mahkamah secara eksplisit menyatakan bahawa sebarang dokumen yang tidak dicabar akan dianggap sebagai dipersetujui dan diterima daripada segi kandungannya. Plaintif telah meletakkan beberapa gambar–gambar ke dalam ikatan yang berkenaan dan bekas peguam defendan yang terdahulu tidak membantah gambar-gambar tersebut pada masa material tersebut. Gambar-gambar tersebut kekal sebagai dipersetujui dan diterima masuk daripada segi kandungannya dan bantahan peguam defendan yang baru terhadap kebolehterimaan gambar-gambar tersebut tidak boleh diterima, walaupun terdapat kemungkinan bahawa peguam yang baru tidak tahu tentang arahan mahkamah (lihat ms 596D–F).

(2) Selepas menunjukkan petanda bahawa tuntutan akan benar-benar dicabar, dan selepas menafikan di dalam pembelaan bahawa beliau bersetuju untuk memeluk Islam dan berkahwin dengan plaintif dan sebagai balasan untuk pinjaman yang dijanjikan, defendan sepatutnya merupakan saksi defendan pertama untuk pembelaan. Adalah menjadi tugas defendan, yang arif dengan fakta kes, untuk berikan keterangan bagi pihaknya sendiri dan kegagalannya dengan jelas melemahkan kebenaran di dalam kesnya dan mewujudkan kebenaran di dalam kes plaintif. Walaupun tidak terdapat rukun undang-undang bahawa defendan mesti dibenarkan untuk disoal sebagai saksi untuk mewujudkan kesnya, mahkamah mempunyai justifikasi dalam menolak penegasan di dalam pembelaannya. Oleh kerana semua fakta material telah dikatakan terhadap defendan dan fakta-fakta tersebut adalah di dalam pengetahuan peribadi defendan, dan

defendan enggan memberikan keterangan tanpa apa-apa sebab yang munasabah, suatu inferens bertentangan mestilah disimpulkan terhadapnya (lihat ms 597G–H, 598B–D).

(3) Cubaan oleh pembelaan untuk memanggil pakar berkenaan dengan undang-undang Islam untuk menunjukkan bahawa pengakuan hubungan rapat secara seksual dengan seorang wanita yang telah berkahwin oleh defendan telah melanggar s 24(c),(b) dan (e) Akta Kontrak 1950 adalah tidak relevan dan tidak akan dapat membantu mahkamah. Dalam apa hal sekalipun, perkara berkenaan dengan undang-undang Islam mestilah diuruskan oleh mahkamah yang berbeza iaitu mahkamah syariah (lihat ms 601F–G, 602C–D).

(4) Kes-kes khas di mana suatu award untuk ganti rugi teladan boleh dibuat adalah terjatuh di dalam tiga kategori, iaitu; (i) kelakuan kakitangan kerajaan yang menindas, arbitrari dan tidak berperlembagaan; (ii) kelakuan yang dikira akan membawakan keuntungan; dan (iii) pemberian kuasa oleh statut secara nyata. Tujuan ganti rugi teladan adalah untuk menghukum dan pandangan yang diterima adalah bahawa bukan untuk mengenakan award yang melampau di bawah kategori yang kedua. Mahkamah di dalam membuat award sebegini sepatutnya mempertimbangkan kelakuan pihak-pihak, terutamanya defendan. Dengan mengambil kira semua faktor-faktor dan menolak pengiraan plaintif, suatu award berjumlah RM500,000 patutlah dibuat (lihat ms 603G–604A, 604D–605B).

(5) Seorang plaintif berhak untuk mendapatkan ganti rugi teruk jika beliau boleh menunjukkan bahawa kelakuan defendan menimbulkan rasa meluat sehingga mewajarkan award tersebut. Di dalam kes ini, dengan mempertimbangkan fakta bahawa plaintif adalah tertakluk kepada soal balas yang berpanjangan selama lebih dari 14 hari oleh dua peguam berpengalaman yang tidak berputus asa berkenaan dengan perkara yang belum dipatahkan dan dengan mempertimbangkan cara soalan diutarakan dan dengan meletakkan persoalan-persoalan di mana defendan sendiri boleh wujudkan, plaintif telah membuktikan kes untuk ganti rugi teruk dan wang berjumlah RM500,000 patut diawardkan (lihat ms 605B–C, G–H).]

Notes

For cases on jurisdiction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2834–3057.

For cases on damages, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1955–2051.

For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 77–119.

Cases referred to

Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla [1999] 2 MLJ 567 (refd)
Prema Korgaokar v Mustak Ahmed AIR 1987 Guj 106 (refd)
Ramah binti Ta'at v Laton bte Malim Sutan
Rookes v Barnard & Ors [1964] AC 1129 (refd) [1931] FMSR 128 (refd)

Legislation referred to

Contracts Act 1950 s 24(c), (b), (e)
Evidence Act 1950 ss 114, 136

Karpal Singh (*Tuan Haji Sulaiman Abdullah* and *M Manoharan* with him) for the plaintiff.

Gurbachan Singh (*Kartar Singh* and *Gurubachan Singh Johal* with him) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J: The statement of claim of the plaintiff disclosed a straight forward set of facts. It was the plaintiff's case that he loaned the defendant a sum of RM262,350 to enable her to purchase a total of 165,000 shares in Insas Sdn Bhd ('Insas'). The defendant, as an employee of Insas, was offered, pursuant to the employees share option scheme ('the Scheme') the right to purchase, based on her position and tenure of office, the 165,000 shares which said option to purchase, she could exercise within a period of five years. The consideration moving from the defendant was that she would convert to Islam and marry the plaintiff. It was also a condition that the defendant would transfer 50% of the said shares to the plaintiff. The remaining 50% was to be held by the defendant in her name and to be used by her for her own use in the event of the plaintiff pre-deceasing her. In the event the defendant failed to go through with the agreement to convert and marry the plaintiff, the defendant was to return the said shares to the plaintiff. The defendant had indeed transferred 82,000 shares in Insas to the plaintiff.

Case for the defendant

The defendant's case was that she was happily working in Insas when the plaintiff persuaded her to do some freelance work for his company, Glamour World of Sports Sdn Bhd ('GWS'), from February 1995 to July 1996, namely in respect of the Merdeka Soccer Tournament in 1995, the visit of the Manchester United Team in 1995 and the award ceremony of the Sports Writers Association of Malaysia in 1996. The defendant alleged that whilst she was promised payment for these freelance work, the plaintiff had failed to pay her. Instead the plaintiff had agreed that he would first advance payment of the sum of RM262,350 for the purchase of the 165,000 shares and that instead of the plaintiff settling the sum of RM131,140 which the defendant contended was the sum due to her as payment for the freelance work she had done, she could retain the 83,000 Insas shares.

Coincidentally she also said that this figure of RM131,140 was the exact price of the 83,000 shares that were retained by her. She therefore contended that the plaintiff was not entitled to the return of the 83,000 shares or its value in money on account of the set off that she was claiming. The defendant therefore prayed for the case to be dismissed with costs.

The claim

The plaintiff claimed the following:

(1) A declaration that he was the beneficial owner of the 83,000 shares in Insas in the name of the defendant.

(2) The sum of RM131,140.00 being the price of the 83,000 shares, when the plaintiff purchased the same in August 1996.

(3) The sum of RM19,900 being the profit made by the defendant by selling 20,000 of the 83,000 shares in her possession.

(4) Exemplary and aggravated damages for deception and fraud in misleading the plaintiff into believing that the defendant would convert to Islam and marry him.

(5) Interest to be set at the discretion of the court.

(5) Costs.

(6) A permanent injunction to restrain the defendant from dealing with the shares in any manner whatsoever.

Findings of the court

This case went on for 25 days. The plaintiff's case is based purely on a loan with consideration moving from the defendant that she would convert to the personal law of the plaintiff, and marry him. Ensconced in this belief and blinded by the love-tinged arrow of Cupid the plaintiff was so infatuated with the defendant that on his own admission, he would do whatever the defendant wanted him to do. On hearing the evidence presented in court, I am satisfied that whilst the defendant was employed at Insas and earning RM6,000 the plaintiff offered the defendant an executive's post in his company GWS at a salary of RM10,000 a month, tax free and with many other fringe benefits. The plaintiff testified that whilst he had offered the defendant such an employment and on such liberal terms, the said offer was made upon the suggestion of the defendant so that she could be with him all the time and that she could give an explanation to her husband and her family for her continuous absence from her matrimonial home.

The plaintiff testified that although many a time he had found the defendant's presence at meetings more of a nuisance than a help, he went along with the defendant's suggestion because on his meeting with the defendant on 5 January 1995 when the 'Malam Anugerah Bola Sepak Negara 1995' was held at Hotel Hilton, Kuala Lumpur, the defendant on her own volition insisted on accompanying him to his presidential suite at the Hilton Hotel where she changed into the bathrobe provided by the hotel. She kissed him and one thing leading to the other they ended up

having sex. From then on their feelings blossomed and he met her almost everyday from 5.30pm to 8 or 9pm except on Saturdays and Sundays when she stayed at home. Their relationship escalated. It is in evidence that the plaintiff realised that the matter was getting too serious for comfort. One night at about 2am and outside the Kentucky Fried Chicken outlet at Bangsar Baru, he advised the defendant to return to her husband. She was aghast at this suggestion. She even threatened to commit suicide if the plaintiff decided to leave her. She then informed him that her husband was irresponsible, was most of the time drunk and had even assaulted her. They continued to have sex on innumerable occasions. He took her on a train trip to Taiping. Evidence was led that she spent the night with him in his private coach. The occasion was his way of treating officials of the Taiping Football Association for his birthday. They all checked into a hotel and he spent his birthday dancing away the wee hours of the night after cutting his birthday cake which she helped to cut. Numerous photographs showing both the plaintiff and defendant in compromising positions were tendered as exhibits.

Case management

Whilst on the exhibits, it is necessary for me to state a few words on my case management procedures. At the outset I had taken this case through monthly pre-trial case managements. At one such case management, I had directed parties to file all documents into bundles called common agreed bundles of documents ('CABD') and had directed that if any party wished to challenge any document in the said CABD, the challenger had to write to the other side requesting that the contents of the document in question be proved. I had explicitly stated that any document not challenged would be deemed agreed and admitted of its contents. When all these photographs were put in by the plaintiff into the various CABDs, the defendant's previous solicitors had not objected to any of the documents. The documents and photographs therefore stood as agreed and admitted of their contents. During the course of the trial Mr Gurbachan Singh, the third firm of solicitors representing the defendant, possibly being unaware of the court's directions, objected to the admissibility of the said photographs. I had to overrule his objections.

Evidence of the plaintiff

The defendant stayed with the plaintiff in the same room in the Radisson Hotel at Langkawi and in the Churchill Inter-Continental in London and toured Europe alone with the plaintiff. The defendant also underwent an abortion in London and the plaintiff paid for the cost of the said abortion because he said the foetus was his. The defendant's case was that the foetus was that of her husband although it was admitted that the plaintiff paid for the cost of the abortion. Taking all these factors cumulatively, I have no hesitation in holding that the defendant did indeed carry on an intimate sexual relationship with the plaintiff.

The pleadings

The statement of claim contained merely a claim based on a loan transaction and the only reference to any sexual encounters in the statement of claim was a statement by the plaintiff that the defendant had requested of him to refrain from having sex with anyone else other than herself. The defence however starts off by the defendant denying in para 1 that she is the person described as the defendant in the writ. Now, this makes no sense in the light of the admitted hotel bills, abortion bill and the multitude of photographs tendered. The defendant contended that she did freelance work for the plaintiff in respect of the Merdeka Tournament, the visit of the Manchester United Team and the award ceremony of the Sports Writers Association of Malaysia, and that she was entitled to payments for such work. The defendant contended that being a devout Hindu she would never leave her religion and denied promising to marry the plaintiff. The defendant also argued that the plaintiff's claim ought to fail as being contrary to public policy and on grounds of immorality. I had considered s 24 of the Contracts Act 1950 in full when I dismissed the defendant's application to strike out the writ (see reported judgment in *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla* [1999] 2 MLJ 567). The defendant also alleged that the plaintiff was involved in certain share investment schemes whereby he would collect large sums of money from several people with a promise to refund the same together with a substantial amount as profit. It is interesting to note that no evidence was at all adduced in respect of this allegation.

The defence therefore elicited an electrifying reply that caused constant sparks throughout the trial. The plaintiff pleaded that he would show through the defendant's credit cards and other documents that her name was indeed as pleaded and that she had, by denying that she was the defendant, attempted to cheat, lie and mislead this court and the general public.

As for the shares, the plaintiff in his reply contended that he would adduce evidence to show that the defendant purely held the shares on the basis of his pleadings and that they did not beneficially belong to the defendant.

Failure of the defendant to testify

Both counsel concede that their research confirms that there is no local precedent where a party, not a witness to a case, has refused to testify. It is my view that having given every indication that the claim would be resisted to the hilt, and having denied in the defence that she had agreed to convert to Islam and marry the plaintiff in return for the promised loan of RM262,350, the defendant would have been the first witness for the defence. I had earlier made a ruling that the defendant ought not to be allowed to call other witnesses first. The said ruling is based on simple logic. The defendant, the main proponent to the litigation, must herself rebut the plaintiff's allegations. Other evidence can corroborate her testimony. Further if the defendant is allowed to sit in and listen to the evidence of

other witnesses, there can always arise the insinuation when the defendant decides to testify, that she is tailoring her evidence to suit the evidence already given, since she was present in court to hear the evidence. But in this case that was not what happened; the defendant elected not to testify and instead called other witnesses. Mr Karpal Singh for the plaintiff urged me to invoke s 114 of the Evidence Act 1950 against the defendant. In relation to s 114, Sarkar states in his Law of Evidence (1998 Ed) at p 1686 that 'presumptions are necessarily made against parties who have knowledge of the facts in dispute [and] will not subject themselves to examination when a prima facie case is made against them, and when by their own evidence, they might have answered it'. It is my judgment that since all these material facts have been alleged against the defendant and which facts are personal to, and within the knowledge of the defendant, and when the defendant as in this case refuses to take the witness stand without any plausible reason, an adverse inference must be drawn against her. Mr Gurbachan Singh argued that she has a right in law not to testify. Whilst I agree that there is no compulsion, I must hasten to add that the defendant must be prepared to face the consequences of an adverse inference being drawn against her for her failure to testify. To my mind it is the bounden duty of the defendant, acquainted thoroughly with the facts of the case, as she is, to testify on her own behalf and failure to do so would clearly go to discredit the truth of her case and to establish the truth of the plaintiff's case. Whilst there is no rule of law that the defendant must let herself be examined as a witness in order to establish her case, this court will be perfectly justified in rejecting the averments in her defence unless there is other persuasive evidence in support of her case. In so far as the defendant was concerned she let her husband testify on her behalf. His evidence, particularly relating to matters in issue, were so peppered with hearsay evidence that almost all such evidence relating to matters in issue had to be rejected. He was never present during any of the conversations between the plaintiff and the defendant and what he told the court was what was told to him by his wife, the defendant, and by her deliberate act of refusing to testify, such evidence is pure hearsay.

The defendant in my view attempted to avoid the crucial test of the law and practice relating to justice, that is, to subject herself to the acid test of cross-examination. Forged on the anvil of truth, the evidence that thus emanates is sheathed with the respectability that only cross-examination can bestow. The defendant failed to go through the ritualistic baptism of fire to emerge pure and serene. To my mind, like the fact that lay before her she sullied herself by her dismal failure to stand the test of cross-examination.

Husband to the rescue

Whilst the court might be moved to sympathize with the husband for having to testify on his wife's behalf, I cannot but let sympathy get the better of my reason. This attempt to lead the husband as the sacrificial lamb and subject him to ignominious ridicule with a barrage of attacks both personal and relating to the marriage, whilst suggestive of a clever manoeuvre to avoid calling the defendant, is in my view a degrading practice totally to be

A abhorred and rejected, in the absence of the evidence of the defendant herself.

Conspiracy theory

B The plaintiff had testified that whenever he went to pick up the defendant at her house on their trip to Taiping or Ipoh, the husband would in fact carry his wife's bag and put it in his car. Undisputed evidence was led that the defendant accompanied the plaintiff for days to Thailand, Taiping, Langkawi, London and Europe. Surely the defendant's husband ought to have known where his wife stayed. The husband's evidence that he totally C trusted his wife and that he never doubted her must be considered in the light of the plaintiff's evidence which was that the defendant had confided in him that the husband was good for nothing, a drunkard and that the wife had treated him with so much disdain that even when the plaintiff was present she would scold him for making capatis with ghee since the plaintiff does not take ghee. To my mind there is clear prime facie evidence deposed D to by the plaintiff to show that the husband was well and truly aware of his wife's goings-on. And yet he did nothing. I am therefore inclined to accept the plaintiff's suggestion of a conspiracy by the defendant and her husband to allow the defendant to be used by the plaintiff for the husband's and wife's mutual benefit. I am further moved to accept the conspiracy theory because the husband himself had written three letters to the Attorney E General, the Islamic Religious Department Selangor and Wilayah complaining that the plaintiff had admitted having sexual intercourse with his wife. The casual and carefree manner of these complaints are a far cry from the reactions of any normally wounded husband.

F *Plaintiff's explanation reasonable*

I accept the plaintiff's evidence that he gave a loan to the defendant to purchase the shares and that she was to hold 83,000 for herself, after transferring 82,000 to the plaintiff, and that he had given his loan upon the defendant's promise to convert and to marry him. I accept the evidence of G Mohd Som, the remisier, who testified that the plaintiff had told him the entire arrangement in the defendant's presence. This witness was unshaken under cross-examination on this vital issue. The only way such evidence could have been negated was by calling the defendant; but she chose not to testify.

H *Deceit*

I accept the plaintiff's submission that there is deceit in the whole conduct of the defendant. I find that clearly she had no intention whatsoever of converting to Islam and to marry the plaintiff. Her intention no doubt was to obtain as much benefit as possible from the plaintiff. The defendant very I clearly suggested to PW5, Abdullah Hussein, the plaintiff's limousine driver, in Singapore, that soon he would have to address her as Datin. In the absence of any challenge by the defendant testifying against such evidence,

this evidence stands unrebutted. Then again Mohd Fudzi, PW3, the Editor of 'The Malay Mail', testified that at one official function that he attended, the defendant introduced herself as Mrs Abdullah. Again this evidence stands unrebutted, for the same reason.

From the fact that the defendant has refused to testify I cannot reject the submission of Tuan Haji Sulaiman Abdullah, counsel for the plaintiff, that the game plan of the defendant and her husband was that by filing such a defence, the plaintiff would be put off from defending and that he would not have the guts to do so. Unfortunately for the defendant, the nature of such pleadings had forced the plaintiff to reply in detail and in my judgment, forced him to reveal sordid details of the sexual encounters and exploits with details of abortion. The submission of Mr Gurbachan Singh that the plaintiff himself was shameless, indecent and immoral and was clearly not out to seek justice for himself but to embarrass and humiliate the defendant and to cause her maximum shame, is not borne out by any evidence. I call to mind the words of William Congreves in 'The Morning Bride' (III, viii (1697)):

> Heav'n has no rage, like love to hatred turn'd,
>
> Nor Hell a fury, like a woman scorn'd.

Whilst we have often heard of this when coined in prose to read, 'hell hath no fury like a woman scorned', it cannot be gainsaid that equally, a woman might have to, at times, face the consequences of unrequited love. The plaintiff was so infatuated with his affection for the defendant that he even admitted that he would do whatever she wanted him to do. To my mind, it is this knowledge that he has been made use of that had led the plaintiff to erupt like an exploding volcano spewing details of intimacy that once were cloistered within his heart. It is obvious from the manner he gave his evidence and his condemnation of the defendant and her husband and his description of them in words far from pleasant, that these were the outpourings of a man described by his own counsel as being bereft of his shares and of the woman of his desire.

Defendant's lack of evidence

To the submission of the defendant that the value of the 83,000 shares held by the defendant amounting to RM131,140 was in fact the actual sum due to the defendant from the plaintiff for the freelance work she had done prior to joining GWS, I asked Mr Gurbachan Singh if there was anything pleaded to show how the defendant had calculated the working hours and the rate at which the calculations were worked out for the defendant to coincidentally arrive at the same amount of RM131,140 as the amount due to her, counsel in his usual candid manner conceded there was none. Again when I enquired if any evidence was led to that effect, so that an application to amend could be made, Mr Gurbachan Singh readily admitted there was no such evidence led. In any case the only person who could give any credible evidence on this aspect would be the defendant and she chose not to testify. Counsel urged me to rely on the evidence of 'Pardeep for

whatever it is worth'. That is precisely the point. Pardeep's evidence on this is worthless and does not support the defendant's contention as whatever was said by him relating to this aspect was clearly hearsay.

Much was made of the fact that the central depository account opened by the defendant did not have the word trust written on any of the forms. To my mind nothing turns on this. It was the defendant who filled up the form and if she chose not to use the word trust on the application form that is the end of the matter. But the indisputable evidence of Mohd Som who was told by the plaintiff of the arrangement in respect of the shares in the presence of the defendant, remains unchallenged.

The defendant launched an attack on the plaintiff's credibility by pointing out that the defendant had lied when he said he had paid the defendant's November 1997 EPF contribution, when evidence led by DW5, Aminuddin Abdul Aziz, the Pengurus Cawangan KWSP Pudu, was to the effect that entry for the month of November means that payment was made for the month of October and not November 1997. With only this evidence available it was suggested that the plaintiff was a liar. The plaintiff had testified earlier that he had left all payments and administrative work to the defendant and he even testified that he was summoned by the EPF for non-payment because of the defendant's own dereliction of her duty. After all, whilst it was the plaintiff's view that the defendant's employment with GWS was merely so that they could be together, yet paying a salary of RM10,000 and tax free at that, he had expected some work from her. Mr Gurbachan Singh argued that she would be foolish not to pay her own EPF. But we will not know if she had forgotten to pay whilst not being foolish in not wanting to pay, because she failed to testify.

In the circumstances, having read the entire evidence, I am satisfied that the plaintiff has indeed proved his case. Mr Gurbachan Singh again with forthright candour conceded that if the court found for the plaintiff, then he was entitled to the prayers sought except for the damages.

The expert

During the course of the trial, the defendant attempted to call as an expert, Asso Prof Mohd Ridzuan bin Awang. When I questioned Mr Gurbachan Singh pursuant to s 136 of the Evidence Act 1950 as to the relevancy of the said witness, counsel indicated that his purpose of calling the expert in Islamic Law was to show that the admissions of the defendant of sexual intimacy with a married woman had infringed s 24(c), (b) and (e) of the Contracts Act 1950. Having heard arguments I disallowed the expert from being called and immediately ruled as follows which I now record from my notes:

> Court:
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> Having heard the arguments as to whether Asso Prof Mohd Ridzuan bin Awang ought to be allowed to testify in this case the following is my ruling:
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> (1) The plaintiff's cause of action is based on a loan given by him to the defendant to enable her to purchase 165,000 Insas shares.

(2) It is the plaintiff's case that her consideration was that she would convert to Islam and marry him.

(3) He thus gave the loan.

(4) She refused to convert and marry him.

(5) She has returned part of the shares.

(6) He now wants the balance or their value.

(7) Plaintiff says the sexual experiences and encounters he had with the defendant have nothing to do with the loan.

(8) He says he had to relate all these to show the close relationship he had with her to establish the fact that in truth she had agreed to convert and marry him.

(9) It was also to rebut her defence that the payment of the sum of RM262,350.00 was for work done by the defendant and also as an inducement for her to leave Insas and to join the plaintiff.

(10) Since these are the basis of the entire case of both parties I do not see the need for this expert witness on Islam to assist me.

(11) Besides I bear in mind the timely warning of Thorne J in *Ramah binti Ta'at v Laton binti Malim Sutan* [1931] FMSR 128 that matters relating to Islamic religion be dealt with by a separate court that ought to be set up, meaning the Syariah Court. I am relying on the decision in *Prema Korgaokar v Mustak Ahmed* AIR 1987 Guj 106. In the written judgment I shall if need be elaborate on the 2 cases.

I did however emphasize that in this written judgment I would elaborate on the above two cases. In respect of *Ramah*'s case all I need by way of elaboration is to quote a passage from the judgment of Thorne J at p 131. He said as follows:

> ... Although I have held that the Supreme Court has jurisdiction to deal with such cases as the present, the further question emerges as to whether or not the Supreme Court is the proper tribunal for dealing with these cases, and whether it would not be more consonant with the views of those professing the Mohamedan religion that His Highness the Sultan in Council in each State should establish special Courts for dealing with these cases with an appeal to His Highness the Sultan in Council in each case; of course the jurisdiction of the Supreme Court and of the Court of Appeal would properly be excluded by such Enactment.

The private eye

Again during the trial, Mr Gurbachan Singh attempted to call as a defence witness one Louis Anton who described himself as a private investigator (PI). He was to testify that he was retained by the plaintiff to keep surveillance on the defendant. It is important to note that when the plaintiff testified it was never put to him that he had retained the services of this witness to keep tabs on the defendant. To my astonishment Mr Karpal Singh whilst objecting, informed the court that his client, the plaintiff, denied even knowing this witness and denied engaging him. I then asked the witness if he had any written instructions from the plaintiff to act. The answer was in the negative. I then asked the PI if he had sent any written

report to the plaintiff. Again the answer was in the negative. I then asked Mr Gurbachan Singh if he had actually warned the witness that he might be breaching his rules of ethics by testifying on behalf of the person on whom he was to maintain surveillance and against the party that had appointed him to cause the surveillance, that is, assuming the plaintiff had actually appointed the said witness. Again with forthright candour Mr Gurbachan Singh admitted he had not. Since in my view it was totally unfair to spring this witness upon the plaintiff without even giving the plaintiff the right to respond in his evidence as to whether he indeed did engage the said PI, I disallowed the defendant from calling this witness to testify.

Damages

The plaintiff prayed for both exemplary and aggravated damages relying on the fact that the defendant and her husband had conspired to lead the plaintiff into believing that the defendant would convert and marry him.

Since I have found that I accept the plaintiff's version as the truth, it follows therefore that there is a breach of promise of marriage. Whilst I agree that this case is not either based on a breach of promise of marriage or that the cause of action is breach of promise of marriage, I must not forget the fact that it was this promise to convert and to marry, that induced the plaintiff to grant the loan. When such promise is coupled with deceit, a stronger case for damages is made out.

Is the plaintiff entitled to a claim for exemplary damages? Unfortunately neither side has assisted me satisfactorily on the issue of damages. This is not a case of defamation. However, in the interest of justice it became necessary for the court to research the law since with regard to exemplary damages, such a claim has indeed been made by the plaintiff. McGregor on Damages (16th Ed, 1997) states at p 287 para 430 as follows:

> The primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence or the like.

However, in *Rookes v Barnard & Ors* [1964] AC 1129 the House of Lords took the opportunity to review the principle of awarding exemplary damages and held that, except in a few exceptional cases, it is no longer permissible to award exemplary damages against a defendant, however outrageous his conduct. From *Rookes v Barnard & Ors* it became the law that exemplary damages can now only be made in cases where such awards were made in respect of causes of action prior to *Rookes v Barnard & Ors*.

The exceptional cases in which such award could be given as explained by the law lords in *Rookes v Barnard & Ors* fell into three categories:

(1) Oppressive, arbitrary or unconstitutional conduct by government servants.

(2) Conduct calculated to result in profit. A

(3) Express authorisation by statute.

As I see it, the only way that the plaintiff can justify seeking an award for exemplary damages is to show that he fell into any one of these three categories. Whilst it must be conceded that the first and the third categories are not applicable in this case, to my mind the only category that can apply B here is the second. In Rookes v Barnard & Ors, Lord Devlin said at p 1227:

> ...Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the C strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which he either could not obtain at all or not obtain except at a price greater than he wants to put down.

The extension of the meaning given to 'profit' as explained by Lord Devlin clearly envisages the desires and aspirations of the defendant to be called D Datin or Mrs Abdullah and to reap the benefits that go with such prefix. Certainly leading the plaintiff to believe in her subsequent conversion to Islam and marriage got her an all expenses paid trip to London, Naples, Milan and Rome and Bangkok where she had an expensive birthday splash and expensive gifts such as a RM25,000 ring as explained by the plaintiff. E

Since the object of such an award is to punish, the prevalent view is not to make excessive awards under this category. However, McGregor on Damages advocates that the court ought to, in making this award, consider the conduct of the parties and in particular, the defendant. The plaintiff testified that the defendant promised to marry him sometime in January 1998 and that she sought for time to divorce her husband. She told him that F if he loved her very much, he ought to wait for her. She was quoted as having said, 'I love you very much and I want to marry you at all costs. Just be patient a bit.' The defendant in my view led the plaintiff on by her conduct in that soon after arriving from an extensive and expensive tour of Europe, she refused to return home to her family and insisted on taking a G spontaneous connecting flight to Singapore where they again stayed together for a few days to be chauffeured by PW5, Abdullah Hussein, the limousine driver. When the plaintiff led evidence that he was told by the defendant herself that she had had relationships with corporate figures and VIPs she challenged disclosure of the names for the purpose of clearing her name and honour. Yet she failed to testify. Considering all these factors and H rejecting the plaintiff's own quantification I am of the view that a sufficient award should be made to focus on the seriousness of the whole issue which unfortunately the defendant had treated with levity and frivolity. The defendant had made wild and unsubstantiated allegations against the plaintiff. She had accused him of being a cheat in that it was pleaded that he was involved in a share investment scheme whereby he would collect I large sums of money from investors with a promise to refund the same with a large profit. These allegations were hastily and wantonly flung at the

plaintiff with scant regard to his reputation as a businessman. She even alleged that the plaintiff was a procurer of women for VIPs. She put to the plaintiff that his favourite drink was Chivas Regal whisky. All these allegations remain unproven. There was unrebutted evidence from the plaintiff that because of the threatening calls made against him, his wife and his daughter, he had to take his daughter off from the school. Live snakes tied in gunny sacks were thrown into his garden. The caller over the phone threatened to harm his family if he did not drop the suit. I can imagine the anguish and harassment the plaintiff and his family has been put to.

Finally I must say that it must have taken great strength and courage for the plaintiff to have decided that enough was enough and that he would put a full stop to the scheming machinations of the defendant and her husband. In the circumstances, under this head I award damages amounting to RM500,000.

Aggravated damages

Under this head the plaintiff is entitled to damages if he can show that the conduct of the defendant was so obnoxious as to warrant an award. The plaintiff was subjected to humiliating and insensitive questions which were never substantiated. For example it was put to the plaintiff that no human being would stoop to his level by making false, baseless and fabricated allegations of sexual relations with the defendant. When it was put to the plaintiff the court must assume that positive evidence would be led to prove the matters put (see article by Mahadev Shankar J, Putting and Suggesting in Cross-Examination [1984] 1 MLJ xi.) Again it was put 'my instructions are the allegations are a total lie'. It was further put 'You are an incorrigible liar.' It was clear to me that whilst the defendant put the plaintiff through the indignity of being subjected to disparaging and contumelious questions she knew very well that she would escape the pain and anguish of such similar possible treatment. This strategy was calculated to cost the plaintiff, bestowed with the title of a Datukship by the Sultan of Pahang, the maximum harm with the maximum publicity since this case was covered by both, all the local, and some foreign media. Further allegations were made that the plaintiff assaulted his maid. No evidence was led to establish this notwithstanding an undertaking given that such allegations would be proven. The maid could have been subpoenaed or the allegation proven in the manner best known to the defendant. Even to the very end the defendant did not let up. Notwithstanding the fact that she did not take the witness stand, she accused the plaintiff of being shameless and indecent. By her refusal to testify the defendant ought to have known that her case had fallen like a deck of cards.

Considering the fact that the plaintiff was subjected to prolonged and lengthy cross-examination for more than 14 days without let up by two experienced counsel on matters that remained unrebutted and considering the callous manner of such questioning and by putting suggestions which the defendant knew she could not establish, I am more than satisfied that the plaintiff has established a case for aggravated damages. Having

considered all matters I award the plaintiff the sum of RM500,000 as aggravated damages.

On the question of interest the plaintiff has asked the court to exercise its discretion and to award such interest from such period as the court thinks fit and just. The plaintiff also prays for two sets of costs. Considering the nature of the case and its complexity it is my judgment that the plaintiff is entitled to two sets of costs.

I therefore give judgment for the plaintiff as follows:

(1) An order that the defendant do pay to the plaintiff the sum of RM131,140 being the cost of 83,000 units of Insas shares registered in the name of the defendant.

(2) An order that the defendant do pay to the plaintiff the sum of RM19,900 being the profit derived by the defendant by selling 20,000 of the 83,000 Insas shares retained by her on 25 February 1997 and on 26 February 1997.

(3) A permanent injunction restraining the defendant from in any way disposing of the shares until she complies with items (1) and (2) of this order.

(4) Exemplary damages amounting to RM500,000.

(5) Aggravated damages amounting to RM500,000.

(6) Interest on item (2) at 6% pa from 1 July 1996 to date of judgment.

(7) Interest on item (3) at 6% pa from 26 February 1997 to date of judgment.

(8) Two sets of costs.

Plaintiff's claim allowed.

Reported by Andrew Christopher Simon